1986

Robert L. Gleave v. The Denver and Rio Grande Western Railroad Company, a corporation, Utah Railway Company, a corporation : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT L. GLEAVE, Plaintiff-Respondent and Cross-Appellant. vs. THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, UTAH RAILWAY COMPANY, a corporation, Defendants-Appellants and Respondents, and THE STATE OF UTAH, DEPARTMENT OF TRANSPORATION, Defendant-Respondent.	CROSS-APPEAL Case No. 20166 Case No. 20300 Consolidated Case No. 20300

CROSS-APPEAL
REPLY BRIEF OF RESPONDENT AND CROSS-APPELLANT ROBERT L. GLEAVE

Appeal from the Judgment of the Fourth Judicial District Court, Utah County, State of Utah
The Honorable Cullen Y. Christensen, Presiding

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POINT I.

PUNITIVE DAMAGES SHOULD BE ALLOWED FOR A RECKLESS DISREGARD OF PUBLIC SAFETY.

Rio Grande argues that punitive damages should not be allowed for a conscious disregard of public safety. (Reply Brief of Rio Grande, at P. 23.)

Older cases required malice-in-fact in order to support a claim for punitive damages. The more modern view is that malice-in-law will support a claim for punitive damages. See e.g., Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1983).

It is often held that recklessness is a component of malice-in-law:

> Utah . . . A defendant's conduct must be malicious or in reckless disregard for the rights of others, although actual intent to cause injury is not necessary. Behrens v. Raleigh Hills Hosp. Inc., 675 P.2d 1179, 1186 (Utah 1983).

> Colorado . . . the injury complained of is attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings. Colo. Rev. Stat., § 13-21-102 (1973).

Connecticut . . . when the evidence shows a reckless indifference to the rights of others or is an intentional and wanton violation of those rights. Collens v. New Cannan Water Co., 155 Conn. 477, 234 A.2d 825, 832 (1967).

District of Columbia . . . for outrageous conduct such as maliciousness, wantonness, gross fraud, recklessness, and willful disregard of another's rights. Riggs Nat. Bank v. Price, 359 A.2d 25, 28 (D.C. App. 1976).

Hawaii . . . for willful, maliciousness, wanton or aggravated wrongs where a defendant has acted with a reckless indifference to the rights of another. Goo v. Continental Cas. Co., 52 Haw. 235, 473 P.2d 563, 566 (1970).

Iowa . . . in a reckless, wanton and grossly negligent manner in total disregard for the safety of workmen. Croxen v. U.S. Chemical Corp. of Wisc., 558 F.Supp. 6 (N.D. Iowa 1982)

Missouri . . . There must be, in order to justify punitive damages, some element of wantonness or bad motive, but if one intentionally does a wrongful act and knows at the time that it is wrongful, he does it wantonly and with a bad motive . . . . Furthermore, an evil intent may be implied from reckless disregard of another's rights and interests. Amish v. Walnut Creek Development, Inc., 631 S.W.2d 866 (Mo. App. 1982).

New Mexico . . . when the conduct of the wrongdoer may be said to be maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard of the plaintiff's rights. Loucks v. Albuquerque Nat. Bank, 76 N.M. 735, 418 P.2d 191 (1966).

New York . . . based upon tortious acts which involve ingredients of malice, fraud, oppression, insult, wanton or reckless disregard of the plaintiff's rights, or other circumstances of aggravation. Le Mistral, Inc. v. Columbia Broadcasting System, 61 App. Div.2d 491, 402 N.Y.S.2d 815, 817 (1978).

Ohio . . . caused by intentional, reckless, wanton, wilful[sic] and gross acts or by malice inferred conduct and surrounding circumstances. Rubeck v. Huffman, 54 Ohio St.2d 20, 374 N.E.2d 411, 413 (1978).

Rhode Island . . . upon evidence of such willfulness, recklessness or wickedness, on the part of the party at fault, as amounted to criminality. Sherman v. McDermott, 114 R.I. 1107, 329 A.2d 195, 196 (1974).

South Carolina . . . must be malice, ill will, a conscious indifference to the rights of others, or a reckless disregard thereof. King v. Allstate Ins. Co., 272 S.C. 259, 251 S.E.2d 194, 196 (1979).

Virginia . . . only where there is misconduct or actual malice, or such recklessness or negligence as to evince, a conscious disregard of the rights of others. Jordan v. Sauve, 219 Va. 448, 247 S.E.2d 739, 741 (1978).

> Wyoming . . . legal malice has been defined as 'wrongful or illegal conduct committed or continued with a willful or reckless disregard of another's rights.' Sears v. Summit, Inc., 616 P.2d at 765, 770 (Wyo. 1980).

POINT II.

THERE IS EVIDENCE IN THE RECORD FROM WHICH A JURY COULD CONCLUDE THAT RIO GRANDE ACTED IN RECKLESS DISREGARD OF PUBLIC SAFETY.

Rio Grande argues that there was nothing reckless about installing a stop sign.

However, Rio Grande misunderstands the argument. Gleave does not seek punitive damages simply because Rio Grande installed a stop sign. Rather, Gleave seeks punitive damages because Rio Grande left that temporary stop sign in place for over ten years. During that entire decade Rio Grande knew that the stop sign was only intended for temporary use. Indeed, Rio Grande had full knowledge that long-term use of such stop signs would cause increased danger. (See Point VII A, Gleave's opening brief.)

Furthermore, Rio Grande took no safety precautions other than placing the stop sign. Specifically, Rio Grande did not burn off the weeds that obstructed vision. Nor did Rio Grande slow the speed of its trains. Indeed, Rio Grande had no rules or regulations at all to protect motorists at

railroad crossings. Finally, Rio Grande has never installed the red flashing lights that were recommended in 1974. [1] (See Point VII B, Gleave's opening brief.)

We have noted, above, that Rio Grande took no steps to improve safety at the crossing in over a decade. The failure to act was not based on any misunderstanding. The failure to act was based upon pure financial self interest. Rio Grande's reply brief contains an interesting comment:

> . . . Rio Grande's desire to have a stop sign at the subject crossing made sense as a temporary measure (i.e. until UDOT obtained federal funds to install active signals).
>
> Reply Brief of Rio Grande, at p.22.

Thus, Rio Grande simply didn't want to incur the expense of installing the red flashing light. Rather, Rio Grande wanted to wait for the State of Utah to install the light. In turn, the State of Utah didn't want to incur the expense of a red flashing light. The State of Utah waited for the federal government to pay for the red flashing

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1/ Rio Grande argues that it had no power to install such flashing lights without approval of the State of Utah. However, that argument still doesn't get Rio Grande off the hook. Here, there is no evidence that Rio Grande requested any approval from the State of Utah to permit Rio Grande to install a red flashing light at Rio Grande's expense. Nor is there any evidence that Rio Grande requested the State of Utah to install a red flashing light at the State of Utah's expense.

light. Thus, everyone knew of the danger. However, everyone waited--hoping that someone else would pay. In the meantime, Gleave was squashed like a bug.

In summary, Rio Grande knew of the grave danger. However, Rio Grande did almost nothing at all. The only thing Rio Grande did was to install a stop sign which simply made matters worse. A jury could conclude, on these facts, that Rio Grande acted in reckless disregard for the public safety.

POINT III.

THE PREJUDGMENT INTEREST STATUTES SHOULD BE BROADLY CONSTRUED TO LESSEN COURT DELAYS.

Rio Grande's brief argues legislative intent. (See p. 20 of grey cover brief.) However, Rio Grande has failed to recognize the true legislative intent.

In a perfect world, an injured party would have his day in court immediately after an accident. However, our world is flawed. An injured person must wait a year--or two--or three to get that date in court--then he must wait another year or two for an appeal.

The only issue is who gets the benefit of that court delay. It is not uncommon for the ultimate resolution of a case (including appeal) to take up to six years.

During that six years, a wrongdoer could save enough on interest to pay the entire judgment. Thus, wrongdoers (and defense law firms) have a powerful motive to delay and clog the courts.

The legislature has given the courts a tool to attack that evil. The tool is § 78-27-44, Utah Code Ann.. This Court should construe the statute broadly to make full use of that tool.

POINT IV.

THE COURT SHOULD NOT LUMP ALL ISSUES TOGETHER FOR REMAND.

It is likely that the case must be remanded on some issues. There might be an issue of contribution between Rio Grande and the State of Utah. Also, the Court might reinstate the issue of punitive damages.

Thus, the question will arise whether to affirm in part and remand some issues; or whether to lump everything together and remand on all issues.

In that regard, Gleave urges the Court to remember the ancient Latin maxim, "justice delayed is justice denied." Gleave was injured over three years ago. Since then, he has not been able to work. He has paid thousands and thousands of dollars for experts and other costs at the first trial.

If it is necessary to re-try all issues together--so be it. However, that pathway is a great hardship to Gleave. Thus, we urge the Court, if at all possible, not to lump all issues together. Rather, we urge the Court to sever and affirm the issue of liability and compensatory damages. The remaining issues can be remanded for further proceedings.

Respectfully submitted this 3 day of July, 1985.

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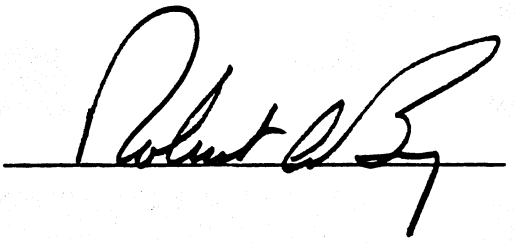
By: 

CERTIFICATE OF MAILING

I hereby certify that four (4) true and correct copies of the foregoing Reply Brief of Respondent and Cross-Appellant Robert L. Gleave re Cross Appeal, (Gleave vs. Rio Grande, Case No. 20166, Case No. 20300, Consolidated Case No. 20300), were mailed via U.S. Mail, postage prepaid, this 3 day of July, 1985, to the following:

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